



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 531

IN THE MATTER OF JOHN BEUKEMA

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and John Beukema ("Beukema") pursuant to §5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On January 26, 1993, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Beukema. The Commission has concluded its inquiry and, on May 9, 1995, voted to find reasonable cause to believe that Beukema violated G.L. c. 268A, §17(a) and 17(c).

The Commission and Beukema now agree to the following findings of fact and conclusions of law:

1a Beukema was, during the times here relevant, a member of the Douglas Zoning Board of Appeals ("ZBA").^{1/} Beukema was appointed to the ZBA by the Douglas Board of Selectmen and, after serving as a ZBA associate member, became a full or regular ZBA member in October 1989. As such, Beukema was a municipal employee as that term is defined in G.L. c. 268A, §1.

2a At all times here relevant, Beukema was self-employed as an architect, with an office in Douglas.

3a In January 1990, Beukema asked the Douglas selectmen to designate him a G.L. c. 268A "special municipal employee."^{2/} The selectmen did not act on this request because it was not from the ZBA itself.^{3/} The ZBA then asked that all its members be so designated. On February 28, 1990, selectmen voted to make all ZBA members "special municipal employees."

4a In 1991, a proposed landfill and a recycling facility (to be located on nearly 290 acres on the north side of Route 16 in Douglas) was under development by Douglas Environmental Associates, Inc. ("DEA"). The landfill and the recycling facility, once developed, were to be operated by Browning-Ferris Industries, Inc. ("BFI").

5a In September 1991, Beukema, d/b/a JN Albert Associates, entered into an Architectural Service Agreement ("Service Agreement") with BFI to design the buildings for the landfill's recycling facility. Pursuant to the Service Agreement, Beukema was to receive a fee of \$2,920 for the design of the recycling facility buildings.^{4/} The Service Agreement further provided, "When requested, the architect shall assist the owner in acquiring necessary permits."^{5/}

6a After entering into the Service Agreement, Beukema proceeded to draw up plans for the recycling facility buildings and site layout.

7a Pursuant to the Service Agreement, in 1992 Beukema prepared an application to the ZBA for a special permit ("Site Plan Review") for the proposed recycling facility under Section VI 6:02 of the Douglas Zoning

Bylaw. The special permit application named DEA president Vincent Barletta (“Barletta”) as the applicant. Beukema signed the application for Barletta on July 13, 1992, and filed it with the ZBA. The application was received by the ZBA on July 16, 1992. The ZBA then scheduled a public hearing on the matter for August 12, 1992, and gave public notice of the meeting by posting and newspaper advertisement between July 22, 1992, and August 5, 1992.

8a On August 12, 1992, Beukema appeared with Barletta at the ZBA public hearing relating to the recycling facility. Beukema, as Barletta’s architect, made a presentation to the ZBA describing the recycling facility and responded to questions from the ZBA and members of the public.

9a Near the end of the August 12, 1992 ZBA public hearing, a member of the public questioned whether Beukema had a conflict of interest in being a ZBA member and Barletta’s (the special permit applicant’s) architect. In response, ZBA Chairman Lawrence “Guy” Bacon (“Bacon”) stated that Beukema would not vote on the matter and that, because ZBA members had been designated as special municipal employees, Beukema’s being the special permit applicant’s architect did not create a conflict of interest. Bacon was then asked if the Commission had been consulted on the issue and Bacon responded “no.”^{6/}

10a Beukema abstained from any participation in the recycling facility matter as a ZBA member. On September 22, 1992, the ZBA, without Beukema participating, unanimously approved the special permit subject to several conditions.

11a Beukema was paid approximately \$3,000 by DEA as compensation for his services under the Service Agreement.^{7/}

12a Section 17(a) of G.L. c. 268A prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation^{8/} from anyone other than the municipality or an agency of the municipality in relation to a particular matter^{9/} in which the municipality is a part or has a direct and substantial interest.

13a Section 17(c) of G.L. c. 268A prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent^{10/} for anyone other than the municipality or an agency of the municipality in connection with any particular matter in which his town has a direct and substantial interest.

14a Section 17 further provides that a special municipal employee, such as Beukema, is subject to §17(a) and §17(c) only in relation to a particular matter (a) in which he has participated as a municipal employee, or (b) which is, or within one year has been, a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving (provided he has served more than 60 days during any 365 consecutive day period).^{11/}

15a The ZBA’s special permit site plan review of the proposed recycling facility was a particular matter, in which the town was a party and had a direct and substantial interest, and was a subject of Beukema’s official responsibility as a ZBA member, within the meaning of §17,^{12/} at the time when Beukema acted on Barletta’s behalf in connection with it and within one year of Beukema’s receiving compensation from DEA in relation to it.^{13/} Thus, condition (b) of the special municipal employee provisions in §17 was met, and Beukema was subject to §17(a) and §17(c) despite his status as a special municipal employee.

16a By receiving compensation from DEA for his services in connection with the special permit site plan review application, Beukema received compensation from someone other than the Town of Douglas in relation to a particular matter (then or within one year a subject of his official responsibility) in which the town was a party and had a direct and substantial interest. In so doing, Beukema violated G.L. c. 268A, §17(a).

17a By preparing Barletta’s special permit site plan review application and filing it with the ZBA, and by speaking on behalf of Barletta at the ZBA hearing, Beukema acted as agent for someone other than the Town of Douglas in connection with a particular matter (then a subject of his official responsibility as a ZBA member) in which the town was a party and had a direct and substantial interest. In so doing, Beukema violated G.L. c. 268A, §17(c).

18a According to Beukema, at the time of his above-described actions he believed that his conduct was lawful because he was a special municipal employee. As set forth above, Beukema was mistaken about the effect of his special municipal employee status. In addition, according to Beukema, he relied on ZBA Chairman Bacon's concurrence with this misunderstanding of the law. Neither of these circumstances, however, excuses Beukema's violations of G.L. c. 268A, §17.^{14/}

19a Beukema cooperated fully in the Commission's investigation of this matter.

In view of the foregoing violations of G.L. c. 268A by Beukema, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Beukema:

(1) that Beukema pay to the Commission the sum of one thousand dollars (\$1,000) as a civil penalty for violating G.L. c. 268A, §17(a) and 17(c); and

(2) that Beukema waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Disposition Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.^{15/}

DATE: August 3, 1995

^{1/} Beukema is no longer a ZBA member.

^{2/} A "special municipal employee" is a municipal employee whose position has been expressly classified by the board of selectmen as that of a special employee under the terms and provisions of G.L. c. 268A. G.L. c. 268A, §1(n).

^{3/} According to Beukema, he decided to make this request after attending a Commission seminar given to Town of Douglas officials and employees (including ZBA members) in December 1989, at which, among other topics, special municipal employee status was generally discussed; in particular, Beukema sought "special" status in order to be able to seek the contract for the design of the new town police station which was advertised for bid in late 1989. According to Beukema, it was his understanding from the seminar that if he had "special" status he would be able, as an architect, to enter into contracts with the town and appear as an architect before town boards, including the ZBA. Thus, Beukema apparently misunderstood what was said at the seminar concerning the effect of special municipal employee status. To the degree that Beukema believed that special municipal employee status would permit him to appear before his own board, the ZBA, and receive compensation for work subject to review by that board, Beukema was mistaken, as set forth herein below.

^{4/} The Service Agreement also provided that Beukema would be paid by the hour for additional work.

^{5/} According to Beukema, at the time he entered into the Service Agreement, he believed that the proposed recycling facility buildings would require only approval by the town building inspector and would not require the approval of the ZBA. Subsequently, however, Beukema learned that the proposed recycling facility buildings would require a special permit from the ZBA.

^{6/} Neither Bacon (who had also attended the December 1989 Commission seminar) nor Beukema sought or received advice from the Commission or Douglas' town counsel regarding whether Beukema, as a ZBA member and special municipal employee, could be the architect for a private client on a project requiring a permit from the ZBA or could appear for a client before the ZBA. Instead, both Beukema and Bacon apparently relied on their shared misunderstanding of the general discussion of "special municipal employee" status at the December 1989 Commission seminar in concluding that Beukema could act as Barletta's architect on the special permit application.

^{7/} Although the Service Agreement was between Beukema, d/b/a JN Albert Associates, and BFI, and Beukema sent invoices for his work to BFI, DEA paid for Beukema's services under the Service Agreement. Among the payments to Beukema by DEA were a \$1,000.00 payment on October 6, 1991 and a \$1,280.00 payment on November 19, 1992. Additional payments (bringing the total to about \$3,000) were received by Beukema on undetermined dates contemporaneous with his services under the Service Agreement.

^{8/} "Compensation" means any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

^{9/} "Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{10/} A municipal employee acts as agent within the meaning of the conflict of interest law where he acts on behalf of some other person or entity. *In re Dias* 1992 SEC 574, 575. The mere speaking or writing on behalf of another party satisfies the agency element of §17(c). *Id.*; *EC-COI-84-6*; see *Commission Advisory No. 13* (Agency).

^{11/} The 60 day requirement applies only to condition (c) and is not here relevant. Condition (b) of §17 is met as set forth *infra*.

^{12/} “Official responsibility” means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(j).

^{13/} The Commission has held that the “keynote of official responsibility is the §potentiality’ of directing agency action and not the actual exercise of power.” *EC-COI-87-17*; i.e., that “official responsibility” turns on the authority to act, not on whether that authority is, in fact, exercised. *EC-COI-92-36*. Thus, the test to determine whether a public employee has “official responsibility” for a particular matter is whether the matter falls within the employee’s authority, regardless of whether that authority is exercised. *Id.* Accordingly, regular members of a municipal board, such as Beukema was, retain official responsibility for all matters which are pending before the board, whether or not they have actually worked on the matters as a board member and whether or not they sat on the board on a given day. *Id.*; see, e.g., *EC-COI-89-7*; 84-48. Thus, a regular municipal board member may not avoid “official responsibility” for a matter simply by abstaining from participation in the matter as board member, and abstention from official participation in the particular matter in question is not a defense to a G.L. c. 268A, §17 violation. *In re Dias*, 1992 SEC 574, 575; *In re Townsend*, 1986 SEC 276, 278; *In re Bingham*, 1984 SEC 174, 175.

^{14/} It is well-established that ignorance of the law is no defense to a violation of G.L. c. 268A. *In re Zerendow*, 1988 SEC 352, 354-355. *In re Brewer*, 1987 DEC 300, 301, *In re Doyle*, 1980 SEC 11, 13, see also *Scola v. Scola*, 318 Mass. 1, 7 (1945). In addition, reliance upon incorrect legal advice is not a defense to a violation of G.L. c. 268A, in the absence of compliance with G.L. c. 268A, §22 and 930 CMR 1.03(3). See *In re Lavoie*, 1987 SEC 286, 287 (“... if a public employee involved in a potentially serious conflict of interest situation seeks to rely on a legal opinion as a shield against action by this Commission, the important substantive provisions controlling the issuance of such opinions must be followed. The opinion must be from town counsel, in writing and made a matter of public record ... such opinion must also be filed with the Commission ...” (citations deleted)). See also *Zerendow*, at 354. Such mistaken understanding of the law and/or reliance on incorrect legal advice may, however, be considered by the Commission as a mitigating circumstance in determining the sanction to be imposed for the violation. *Id.* See *infra*.

^{15/} Although the Commission is authorized to impose a civil fine of up to \$2,000 for each violation of G.L. c. 268A, and to bring a civil action against the violator to recover damages in the amount of up to three times the economic advantage obtained through the violation, the Commission here is imposing only a \$1,000 fine and is not requiring that Beukema give up any of the compensation he received in violation of G.L. c. 268A. This is because the Commission is convinced that Beukema, based upon his misunderstanding of G.L. c. 268A (which was erroneously confirmed by his board chairman), made a good faith, although insufficient and ineffective, attempt to comply with the conflict of interest law by seeking and obtaining “special municipal employee” status for ZBA members and by not participating as a ZBA member in the Barletta special permit matter. That a \$1,000 fine is being imposed, notwithstanding these mitigating circumstances, reflects the fact that the Commission has made clear in a number of cases that public officials cannot engage in the type of conduct engaged in by Beukema, as described above, without violating G.L. c. 268A. See, e.g., *In re Nutter*, 1994 SEC 710, *In re Dias*, 1992 SEC 574, and *In re King*, 1990 SEC 449. Thus, Beukema’s mistake concerned well-established principles of the conflict of interest law and does not relieve him of responsibility for his §17 violations, especially where he failed to seek the advice of town counsel or the Commission concerning the legality of his above-described activities for Barletta (and DEA).